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IN THE
COURT OF APPEALS OF INDIANA

JODY LEE SINCLAIR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0608-CR-357
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Francis C. Gull, Judge
Cause No. 02D04-9802-CF-78

April 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jody Lee Sinclair pled guilty to three counts of Kidnapping[1] as class A felonies and one count of Carjacking[2] as a class B felony. He appeals the sentence he received for those convictions, presenting the following restated issue for review: Did the trial court omit mitigating circumstances in sentencing Sinclair and therefore impose an inappropriate sentence?

We affirm.

The undisputed facts are that Sinclair set out on a crime spree in Lansing, Michigan that ended in Allen County on February 14, 1998. On that day, Sinclair, armed with a shotgun, stopped a van on Highway 69 in Allen County and ordered the vehicle's two occupants, David and Judy Nacy, to get out. With Indiana State Police officers in pursuit, Sinclair drove to a nearby Bob Evans Restaurant and entered the restaurant brandishing his weapon. During the next several minutes, Sinclair wandered around inside the restaurant looking for drugs, purses, and money. During that time, Sinclair took a number of different hostages, always at gunpoint. Among those held hostage at one time or another were restaurant employees America Garcia and Terri Keith, and customer Thelma Bledsoe. Eventually, Sinclair shot his shotgun at a wall inside the restaurant, which prompted a police SWAT team to storm the building and subdue Sinclair.

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[1] Ind. Code Ann. § 35-42-3-2 (West, PREMISE through 2006 Second Regular Session).

[2] I.C. § 35-42-5-2 (West, PREMISE through 2006 Second Regular Session).

Sinclair was charged with carjacking, four counts of kidnapping, four counts of criminal confinement, one count of robbery, and one count of criminal recklessness. He pled guilty to carjacking and the kidnapping charges stemming from the confinements of Garcia, Keith, and Bledsoe. In exchange for his guilty pleas to those offenses, the State dismissed the remaining charges. The plea agreement provided that the parties would present arguments concerning the appropriate sentences to be imposed, after which the court would determine the length of the sentence imposed upon each individual count. The agreement stipulated, however, that all of the sentences would be served consecutively.

Sinclair contends the court should have found the following as mitigators: (1) Sinclair pled guilty, (2) Sinclair has a drug addiction, (3) extended incarceration would cause an undue hardship on Sinclair's dependents (hereinafter, undue hardship), and (4) Sinclair "had longstanding mental health issues that should be considered a mitigating factor[.]" *Appellant's Brief* at 8. At the conclusion of the sentencing hearing, the trial court found Sinclair's criminal history as the lone aggravator, and found two mitigators, i.e., the guilty plea and Sinclair's drug problem. The court found that the aggravating circumstance outweighed the mitigators and imposed the maximum fifty-year-sentence upon each of the kidnapping convictions and the maximum twenty years for the carjacking conviction. Thus, the resulting executed sentence was 170 years.

Sinclair contends the trial court erred in failing to identify undue hardship and his mental health as mitigators. He further contends that had the court properly found them

as mitigators, the mitigators would have outweighed the aggravators, thereby compelling the imposition of presumptive sentences on each count, resulting in an executed sentence of no more than the presumptive term, for a maximum executed sentence of 100 years.

Sentencing determinations, including the finding of mitigating factors, are generally committed to the trial court's discretion. *Scott v. State,* 840 N.E.2d 376 (Ind. Ct. App. 2006), *trans. denied*. A sentencing court must consider all evidence of mitigating factors presented by a defendant, but is not obligated to weigh or credit them in the manner a defendant suggests. *Id*. Also, a sentencing court "need not consider, and we will not remand for reconsideration of, alleged mitigating circumstances that are highly disputable in nature, weight, or significance." *Creekmore v. State,* 853 N.E.2d 523, 530 (Ind. Ct. App. 2006), *clarified on reh'g,* 858 N.E.2d 238. "Indeed, a sentencing court is under no obligation to find mitigating factors at all." *Id*. Nevertheless, if a trial court fails to find a mitigator clearly supported by the record, a reasonable belief arises that the mitigator was improperly overlooked. *Creekmore v. State,* 853 N.E.2d 523.

We have thoroughly reviewed the transcript of the sentencing hearing and can find no reference to undue hardship and the state of Sinclair's mental health as mitigators. He not only failed to present evidence supporting those claims, he failed even to mention them at all. A claim of error premised upon the failure to find a mitigator cannot be based upon a factor not placed before the court. *See Spears v. State,* 735 N.E.2d 1161, 1167 (Ind. 2000) ("(i)f the defendant does not advance a factor to be mitigating at sentencing, this Court will presume that the factor is not significant and the defendant is

precluded from advancing it as a mitigating circumstance for the first time on appeal"). Moreover, even if he had offered them, the sentencing court would not have been compelled to accept the argument.

With respect to Sinclair's mental health, the only mention of that issue in the appellate materials related to sentencing is in the Pre-Sentencing Investigation Report. There, we find the notation: "The defendant advised that he was diagnosed with Post Traumatic Stress Disorder at St. Lawrence Hospital in 1996. He said the [sic] he was diagnosed with the condition due to his life he has had [sic]." *Appellant's Appendix, Volume 2* at 7. It appears that "the life he has had" refers to his history of drug usage, which was one of the mitigators cited by the trial court. That single reference is not sufficient to compel a finding that Sinclair's mental health history should be considered in mitigation of his sentence. In fact, Sinclair's attorney briefly mentioned Sinclair's mental health at the guilty plea hearing, but only in the context of Sinclair's state of mind at the time of the crime spree. Counsel stated:

> I think that Mr. Sinclair's in complete control of his faculties and fully understands what's going on but in my, you know when I first talked with the man and we were in the process, you probably will hear about it at sentencing, he's very, badly addicted to drugs, has been in and out of institutions for drug rehabilitation, drug treatment, in and out of hospitals, etcetera, and so, my concern was, if we get into the issue in the trial of, of, of this case, to try to have some idea on psychiatric examination as to the, as to his state of mind, if you can ever do that, his state of mind at the time the offense occurred. That, that's the whole purpose and he and I, I think he and I had discussed that but I think today and I think within a short period … not a short period but within a period of time after he was confined, after the drugs had worn off and I think that he is, he is competent

> and capable of fully understanding the significance of what I'd filed and it's being withdrawn, he understands.

Guilty Plea Transcript at 20-21. Apart from the foregoing references, Sinclair's mental health was not discussed below. The trial court did not err in failing to cite it as a mitigating factor.

As mentioned above, our review of the sentencing hearing transcript reveals no mention of undue hardship as a mitigator. For that reason alone, this claim fails. *See Spears v. State*, 735 N.E.2d 1161. Moreover, the materials before us reflect that such a claim would have been without merit. At the time of sentencing, Sinclair's two children were eighteen and sixteen years old. Thus, the youngest would be college-aged in two years and twenty-one years old in five years. Even if Sinclair had received the minimum sentence on each of the four counts, his executed sentence would have been seventy years. Therefore, even the shortest sentence would not be completed until decades after his children are emancipated. Finally, we note that there is no evidence suggesting that Sinclair's children rely upon Sinclair for support, let alone inordinately so. There is no basis in the record for finding undue hardship as an aggravating circumstance.

Next, we briefly address the question of whether the carjacking conviction can be imposed consecutive to the other three. We do so because Sinclair mentions the issue in the final sentence of the Conclusion section of his appellate brief. He writes, "and Count 1 Carjacking which is not listed under [Ind. Code Ann. § 35-50-1-2 (West, PREMISE through 2006 Second Regular Session)], as a crime of violence should run concurrent to

the first kidnapping sentence imposed in the above matter." *Appellant's Brief* at 9. The foregoing constitutes the entirety of the discussion of that issue. As such, the argument falls well short of the requirements of Indiana Appellate Rule 46(A)(8)(a) that an "argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22." Therefore, the argument is waived. *Lyles v. State,* 834 N.E.2d 1035 (Ind. Ct. App. 2005), *trans. denied*.

Even were it not waived, and putting aside for the moment that this aspect of the sentence was a part of the plea agreement, the argument is without merit. We presume Sinclair's contention to be that imposing the sentence for carjacking consecutive to the others runs afoul of the following limitation on a court's power to impose consecutive sentences: "except for crimes of violence, the total of the consecutive terms of imprisonment … for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." I.C. § 35-50-1-2(c). We further presume Sinclair would contend that because carjacking in this case was not a crime of violence, it does not fit within the exception and thus cannot be imposed consecutive to the other sentences. Our Supreme Court has already rejected this contention. In *Ellis v. State,* 736 N.E.2d 731, 737 (Ind. 2000), our Supreme Court held that I.C. § 35-50-1-2 should be interpreted to exempt from the sentencing limitation "(1)

consecutive sentencing among crimes of violence, and (2) consecutive sentencing between a crime of violence and those that are not crimes of violence." We are confronted in this case with the situation described in (2), i.e., between crimes of violence (kidnapping) and one that is not (carjacking).

Finally, Sinclair seems to challenge the appropriateness of his sentence. Much of his argument in this respect depends up the success of his contention that the trial court ignored proper mitigators, in that he claims the four proffered mitigators outweigh the lone aggravator.[3] Of course, we have rejected his argument that the trial court erred in failing to find more than the two identified mitigators. Moreover, we do not disagree with the trial court's balancing of factors.

The trial court is not required to consider alleged mitigating circumstances that are highly disputable in nature, weight, or significance. *Creekmore v. State*, 853 N.E.2d. Moreover, a sentencing court need not agree with the defendant's assessment of the weight or value to be given to proffered mitigating facts. *Id*. "Neither is the trial court obligated to explain why it did not find a factor to be significantly mitigating." *Id*. at 530.

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[3] Viz.,

> The Defendant clearly should have been sentenced to the advisory sentence of thirty (30) years or in the alternative a sentence less than the advisory sentence for Counts 2-4, based on the four (4) mitigators (mental health, the hardship that jail time would cause to the Defendant's Dependents, drug use, and his plea of guilty) asserted by the Defendant outweighing the one (1) aggravator listed by the Trial Court of criminal history.

Appellant's Brief at 9.

The Supreme Court has held that the significance of a guilty plea as a mitigating factor may vary from case to case. *See Francis v. State*, 817 N.E.2d 235 (Ind. 2004). It is well established that a guilty plea is not significantly mitigating where the defendant has received a substantial benefit from it or where the evidence of guilt is such that the decision to plead guilty is merely a pragmatic one. *See Wells v. State*, 836 N.E.2d 475 (Ind. Ct. App. 2005), *trans. denied*. Sinclair received a substantial benefit from pleading guilty, in that it resulted in the dismissal of eight other charges, including one class A felony charge, six class B felony charges, and one class D felony charge. Thus, although the guilty plea did save time and expense for the State and spare the victims from the ordeal of testifying, the trial court would be justified in determining that the decision to plead guilty was largely a pragmatic decision, and thus entitled to minimal mitigating weight.

As for the other mitigator, everyone acknowledges that Sinclair had and continues to have a significant substance abuse problem. We note, however, that trial courts sometimes find a history of substance abuse to be an aggravator, not a mitigator. *See Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002), *trans. denied*. Be that as it may, a trial court is not required to consider as mitigating circumstances allegations of appellant's substance abuse or mental illness. *Id*. The presentence investigation report reveals that Sinclair began using illegal drugs approximately in 1968, at twelve years of age. Yet, despite Sinclair's thirty-year history of substance abuse, he has voluntarily sought drug treatment only twice, once for a period of seven days, and another time for

five days, and both of those instances occurred approximately fourteen years before these events unfolded. Since then, he has never voluntarily sought drug treatment and has continued to use illicit substances. Accordingly, Sinclair has not shown that the mitigators identified by the trial court are entitled to significant weight

Against those relatively insignificant mitigators stands Sinclair's criminal history. It begins with a 1975 felony conviction for breaking and entering and ends with an escape conviction in federal court in 1994. Between those two convictions, Sinclair was convicted of possession of marijuana, assault, two separate bank robberies, two separate escapes, and attempted felonious assault. All but the drug offense were felonies, meaning his criminal history consists of one misdemeanor and seven felony convictions. In addition, over the years and with respect to several sentences, Sinclair's probation was revoked three times. The serious nature of the repeat offenses over a long period of time, i.e., Sinclair's criminal history, warrants significant weight as an aggravator.

We agree that the aggravator significantly outweighs the mitigators and conclude that the maximum sentence for each of the offenses committed during Sinclair's crime spree was not inappropriate.

Judgment affirmed.

KIRSCH, J., and RILEY, J., concur.